No. 22,108

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMANUAL BLAZ MRKONJIC-RUZIC,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR REHEARING

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On October 24, 1968 this honorable Court considered the grounds for reversal urged by appellant in the above entitled case. In its opinion the Court found *inter alia* that:

> "Appellant was not deprived of a fair trial by reason of the District Court's *response* to *provocative conduct* on the part of appellant's trial counsel." (Emphasis ours)

This finding refers to action and statements of the District Court described on pages 9-13 of appellant's opening brief.

Judgment was affirmed.

I

THE TRIAL JUDGE MUST BE AND REMAINS IMPARTIAL.

Even an *appearance* of bias may fatally infect the proceedings.[1] This task is not an easy one.

> "A judge, at least in a Federal Court, is more than a moderator . . . Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that, in the end, depends primarily upon the judge."[2]

The trial judge must be patient and "not be thrown off balance by provocations which frequently occur during a trial." In an Illinois case, the Court says: "It is essential that jury trials shall be managed fairly, and that trial judges shall not only be just to both sides, but that they shall conduct themselves in such a manner that an impartial state of mind is apparent to all concerned."[3]

> "The Judge presiding at a trial should maintain an impartial attitude. He must appear neutral, and exercise patience toward the participants. The judge should not be thrown off balance by those *provocations* which a trial contest can be expected to produce. Even if exposed to *great provocation,* the trial judge is not thereby justified in accusing a party's lawyer of unfairness or in holding him up to contempt before the jury, and should not show hostility to him or otherwise treat the attor-

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[1] *Bollenbach v. United States,* 326 U.S. 607; *Wilson v. United States,* 250 F.2d 312.

[2] *Brown v. Walter* (C.C.A., 2, Vt., 1933), 62 F.2d 798, 799-800 (1933). This statement was made by the late Judge Learned Hand, speaking for the Second Circuit.

[3] *People v. Marino,* 414 Ill. 445, 111 N.E.2d 534, 538 (1953).

ney so as to prejudice the interests of his client. The required administration of the trial and necessary control of conduct of counsel can and should be performed effectively without inflicting unnecessary damage to a party's cause."[4] (Emphasis ours)

"The real object of a trial is to secure a fair and impartial administration of justice between the parties to the litigation. The responsibility of striving for an atmosphere of unpartiality during the course of a trial rests upon the trial judge. His conduct in trying a case must be fair to both sides, and he should refrain from remarks which might injure either of the parties to the litigation."[5]

II

DETERMINATION OF THE QUESTION WHETHER THE TRIAL JUDGE HAS OVERSTEPPED THE BOUNDS OF JUDICIAL PROPRIETY MUST BE MADE ON A CASE-TO-CASE BASIS.[6]

There are certain principles which can serve as guides to measure judicial conduct.[7] Among them are:

(1) Harrassment of defense counsel, prejudicial to his client—and this can take many forms—may also require a new trial. For example, the Court may not hamper or embarrass coun-

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[4]*Skelton v. Beall* (Fla.), 133 So.2d 477, 481 (1961).

[5]*Hanzen v. St. Paul City Ry. Co.*, 231 Minn. 356, 43 N.W.2d 260, 264 (1950).

[6]*Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232.

[7]*Herron v. Southern Pacific Co.*, 283 U.S. 91.

sel in the conduct of the defense by disparaging remarks or rulings which prevent counsel from effectively presenting his case or from obtaining full and fair consideration of that case by a jury.[8]

(2) A trial judge should never reprimand or censure counsel in the presence of the jury. "Trial Courts should proceed with dignity, rule impartially, and say as little as possible in the trial."[9] Trial attorneys "owe to the Court, because of the position he occupies, the utmost deference and respect," but, "the court owes to them an equal obligation of courtesy and consideration. . . . In the heat of a trial sharp differences of opinions do arise and things are said which would have been better left unsaid."[10] This does not justify the reprimanding of counsel in the presence of the jury.

(3) "The trial judge should use only such language as is essential to the requirements of the situation and should not belittle counsel's argument or cast unwarranted reproaches on counsel. In the eyes of the jury, counsel and client are so closely identified that a trial judge's belittling of counsel is often prejudicial to the client."[11]

Quite often, what appear to be routine comments by the Court, when viewed independently are insuffi-

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[8]*People v. Becker,* 210 N.Y. 274, 104 N.E. 396; *People v. Kepner,* 267 App. Div. 838, 46 N.Y.S.2d 111; *People v. Adler,* 274 App. Div. 820, 80 N.Y.S.2d 210.

[9]*Kent v. State,* 53 Okla. Crim. 276, 10 P.2d 733 (1932).

[10]*Goldstein v. United States* (C.C.A., 8, 1933), 63 F.2d 609, 613.

[11]*Weinberg v. Pavitt,* 304 Pa. 312, 155 Atl. 867, 871 (1931).

cient to warrant reversal. But when the record is reviewed in its entirety by an Appellate Court, the trial Court's remarks may, in the aggregate, reveal a clear and consistent pattern of judicial bias.[12]

In short, an attorney is entitled to treatment from the trial judge that will not prejudice the rights of his client. This is a matter of right, not of indulgence.[13]

Appellate Courts are exceedingly reluctant to reverse cases because of the misconduct of the trial judge. They are more inclined to recognize the misconduct, but pardon the judge on the theory that the misconduct was not shown to prejudice the jury, which can rarely be done. This affords the litigant no relief. It is "like a rapier thrust in a vital spot, then withdrawing the blade with apologies."[14] The correction for this widespread and well-recognized problem rests almost entirely with the judiciary. Constructive criticism never hurts anyone and may help. "Let justice be done lest the Heavens fall."[15]

In the light of the foregoing, it is urged that the District Court did in fact deny to this appellant his

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[12]*Sunderland v. United States,* 19 F.2d 202; *People v. Becker, supra,* note 8; *Commonwealth v. Fields,* 171 Pa. Super. 177, 90 A. 2d 391; *State v. Phillips,* 59 Wash. 252, 109 Pac. 1047; *Robertson v. State,* 38 Tex. 187.

[13]*Grock v. United States,* 298 Fed. 544.

[14]*Brotherhood of Railroad Trainmen v. Brown,* 170 Okla. 67, 38 P.2d 529, 532 (1934).

[15]Remarks of Chief Judge Harold M. Stephens at the laying of the cornerstone of the United States Courthouse for the District of Columbia, December 25, 1950.

right to a fair trial, and rehearing and redetermination of this issue is requested.

Dated, San Francisco, California,
November 7, 1968.

Respectfully submitted,
GREGORY S. STOUT,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I, Gregory S. Stout, counsel for the petitioner certify that the foregoing petition for rehearing is well founded for the reasons set forth above. I further certify that this petition for rehearing is not interposed for delay.

GREGORY S. STOUT,
Attorney for Appellant and Petitioner.